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IN THE

Supreme Court of the United States

October Term, 1960

No. 37

FRANK WILKINSON

vs.

UNITED STATES OF AMERICA

BRIEF OF *AMICUS CURIAE* NATIONAL LAWYERS GUILD

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Introduction

The National Lawyers Guild is a national bar association among whose principles is the preservation of basic constitutional rights and liberties. It submits this brief because it believes that this case presents an important question of constitutional law, whether a Congressional Committee can lawfully subject American citizens to interrogation solely because of their criticism of the Committee. It is solely to this issue that the National Lawyers Guild addresses itself with the consent of counsel for both parties.

At Bar the Process and Power of a Committee of Congress Has Been Directed Against a Citizen Because of Activity Undertaking Lawful Review of Said Committee by Its Constitutional Superior, the People of the United States. The Constitution, in Fundamental Manner, Restrains and Prohibits Any Employment Thus of Legislative Power by Any Legislative Agency to Influence or Affect Its Own Review and Perpetuation.

The Committee below * as the Record and the Court of Appeals' opinion make clear, directed its investigational and subpoena powers against the petitioner, Frank Wilkinson, only because it was informed he was "sent * * * by the Communist Party" to the site of hearings by the Committee, July 29, 1958, at Atlanta, Georgia "for the purpose of developing a hostile sentiment to [the] committee and to its works for the purpose of undertaking to bring pressure upon the United States Congress to preclude these particular hearings." **

The object of the Atlanta hearings, as expressed in the authorizing Resolution therefor, was to investigate "The extent, character and objects of the Communist colonization and infiltration in the * * * basic industries in the South, and Communist Party propaganda activities in the South" [Gov't Ex. 2, p. 3; Pet., p. 10, fn. 1] but no claim was extended that petitioner had any information or knowledge pertaining to said described subjects, nor even that he had ever previously been in the South [Pet., p. 11].

That the thrust of the Committee's acts was directed against peaceful petitioning for governmental redress and review was underscored by references on the Committee's part to a report previously issued by it entitled "Operation

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* Actually the sub-committee of the Committee on Un-American Activities of the House of Representatives.

** Petition for Certiorari, Appendix B, opinion of Court of Appeals, p. 8a, fn. 1, hereafter cited: Pet., App. B, p. 8a, fn. 1.

Abolition".* Committee counsel referred petitioner expressly to that report as part of the basis and grounds for his investigation.** The report sets forth as prime examples of the activities protested by the Committee, a leaflet issued by the Emergency Civil Liberties Committee, with which defendant was connected, calling upon the American people for opposition to the Committee, including notably the following:

> "(1) *Personal Letters and Visits to Congressmen.*
>
> The most important part of the ABOLITION CAMPAIGN is to urge the individual citizen to—
>
> (a) Visit his Congressman;
>
> (b) Write his Congressman; and
>
> (c) Write the editor of his newspaper.
>
> • • •
>
> "(6) *Petitions to Congress.* Petitions to Congress should be encouraged. Those from local groups should be directed either to the Congressman of the specific community or to the several Congressmen of a city or State. Petitions from national organizations should be directed to the full House of Representatives through the House Speaker, Sam Rayburn. • • •
>
> "(11) *Literature.* Since copies of the Watkins decision are no longer available from either the United States Supreme Court or the Superintendent of Documents, Washington, D. C., the ECLC has undertaken to reprint 5,000 copies for national distribution. Copies are available at 15 cents each, including postage, for local distribution to individuals and organizations." •••

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* "Operation Abolition", issued November 8, 1957 by the Committee, printed by the United States Government Printing Office.

** Pet., App. B, p. 8a, fn. 1.

*** Report, "Operation Abolition", *supra*, App. pp. 17-18.

At the outset we urge the following premises, which the subsequent discussion is intended to support. If the Committee, or any other legislative body or agency, may lawfully exercise coercive, investigative or any other power over the citizen solely because of an appeal to the people for lawful review of such agency's record, the free and sovereign control by the people over all agencies of government is undermined. The mandate of the Committee should not be so construed or applied as to authorize the employment of investigative powers coercively against a citizen because of an appeal by such citizen for a review of the Committee's works by the people within the processes of law. As in *United States* v. *Rumely*, 345 U. S. 41, construction should be had avoiding such fundamental constitutional issues.

I

Integral to "the nature and theory of our institutions of government" is the final supremacy of the people over all other agencies of government, executive, legislative and judicial; in "the people" is reposed "the plenitude" of sovereignty and they constitute "the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage." (*Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, 370; *Chisholm* v. *Georgia*, 2 U. S. (2 Dallas) 419, 470.) "Sovereignty is the right to govern", and in our Constitutional form of government its final powers "reside" in "the people" (*Chisholm* v. *Georgia*, *supra*, p. 471), who in the first instance created and "ordained" the Constitution and all of the bodies of government and who exercise thereover continuing plenary authority. (*Martin* v. *Hunters' Lessee*, 14 U. S. (1 Wheat.) 304, 324-325; *McCulloch* v. *Maryland*, 17 U. S. (4 Wheat.) 315, 402-404.)

> "[In] Britain [all ultimate] power is lodged in the British Parliament. * * * But here, Sir, the fee-

> simple [of liberty] remains in the people at large, and by this Constitution they do not part with it. * * * If a legislature shall make a law contrary to the Constitution, or oppressive to the people, they have it in their power, every second year, in one branch, and every sixth year, in the other, to displace the men who act thus inconsistently with their duties. * * * [T]hey may revoke the lease when the conditions are broken by the tenant."—Remarks of James Wilson, 2 Elliot's Debates, pp. 432, 434, 436.*

Petitioner, in invoking the people's review processes including the ballot and the anciliary processes of the rights of petition, opinion and legislative communication, had resort to the highest processes of all under our law. These powers and functions of the people constitute "a postulate" (*Smith* v. *Allright*, 321 U. S. 649, 661) of our form of government, "fundamental" thereto (Report of the

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* *Accord:*

"In Europe, the sovereignty is generally ascribed to the Prince; here it rests with the people; there, the sovereign actually administers the government; here * * * our governors are the agents of the people, and * * * stand in the same relation to their sovereign in which regents in Europe stand to their sovereigns."—*Chisholm* v. *Georgia*, *supra*, 2 U. S. (2 Dallas), 419, 472.

"In the United States * * * the people, not the government, possess the absolute sovereignty. * * * Whenever it may [occur] that proceedings [by the legislative branch] are chargeable [with error or wrong], it is the duty, as well as the right, of intelligent and faithful citizens to discuss and promulgate [the errors] freely—as well to control them by the censorship of the public opinion, as to promote a remedy according to the rules of the Constitution. * * * [It is by] elections—intended, by the Constitution, to preserve the purity or to purge the faults of the administration—[that] the great remedial rights of the people [are] to be exercised, and the responsibillity of their public agents to be screened."—Madison, 4 Elliot's Debates, pp. 569, 574.

United States Commission on Civil Rights, 1959, p. 19), which "the very idea of a government, republican in form, implies" (*U. S.* v. *Cruikshank*, 92 U. S. (2 Otto) 545, 552). The very "existence" of representational government "depends" (*Ex parte Yarbrough*, 110 U. S. 651, 658) upon the preservation of the people's primacy in the entire electoral process. *United States* v. *Classic*, 313 U. S. 299, 316.

II

The investigative power of Congress is "not without limit * * *"; as a power of law its exercise is "justifi[able] solely as an adjunct to the legislative process", and "must be related * * * [to] a legitimate task of Congress." It may never constitute "an end in itself", nor be so employed as to violate "the Bill of Rights." (*Barenblatt* v. *United States*, 360 U. S. 109, 111, 112; *Watkins* v. *United States*, 354 U. S. 178, 187, 197).

Where there is involved liberty of speech or one of its cognate liberties, any investigative act by Congress, like any other legislative undertaking, must at least* bear the "burden of persuasion" (*Speiser* v. *Randall*, 357 U. S. 513, 526, 529; *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 465; *Bates* v. *Little Rock*, 361 U. S. (Adv. Ops.) 516, 527; *Sweezy* v. *New Hampshire*, 354 U. S. 234, 266) to show that an overriding and valid state object exists sufficient to overcome the injury to such high-ranking rights. And this may be achieved only "upon showing a subordinating interest which is compelling." (*Bates* v. *Little Rock*, *supra*, 361 U. S. (Adv. Ops.) at p. 524; *Sweezy* v. *New Hampshire*, *supra*, p. 265; *Talley* v. *California*, Mr. Justice Harlan, concurring, 362 U. S. (Adv. Ops.) 60, 66.) It

* It is our position that no justification can be advanced for compromising these fundamental freedoms by a "balancing" test, but even under the balancing theory, protection is required at bar.

cannot be doubted that investigative governmental acts compelling disclosures affecting such liberties inescapably impose a "deterrent effect" and burden upon the exercise of those liberties.* (*N. A. A. C. P.* v. *Alabama*, *supra*, pp. 462-463; *Sweezy* v. *New Hampshire*, *supra*, p. 250; *Bates* v. *Little Rock*, *supra*, 361 U. S. (Adv. Ops.) at p. 523.)

III

Even where not exercised in a manner affecting the direct operation of any governmental processes, liberty of speech and the cognate liberties of association, thought and assembly, are often declared protected by a jealous safeguard surpassing that affecting rights of lesser rank. (*Smith* v. *California*, 361 U. S. (Adv. Ops.) 147; *Sweezy* v. *New Hampshire*, *supra*, p. 245; *Speiser* v. *Randall*, *supra*, 357 U. S. at pp. 521, 526.) It is through manifold exercise and enjoyment of those rights that the people equip themselves to discharge the great processes of government assigned to them under our Constitutional system, the processes of review, control and determination over all of the lesser agencies of government. (*Thornhill* v. *Alabama*, 310 U. S. 88, 95-103.)

But surpassing in importance to society even the general exercise of those liberties is the transcendant necessity to secure inviolate the freedom of the electoral process and of the processes of petition, communication and review, whereby under the Constitution the stewardship of the elected legislature as agent and representative of the people is maintained, accounted and determined. Those processes *constitute*, they are not merely antecedent or "essential" to, "the workings of democracy." (cf. *Speiser*-

* "The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference." *Watkins* v. *United States*, *supra*, p. 197.

v. *Randall*, *supra*, 357 U. S. at p. 521). They are *in se* part of the very process of such government, functional parts of the direct, operational machinery constituting the same. They lie within the operating movement of representative government. Restrain or abridge them and the violence to "government by consent of the governed", is concurrent and instant.

Precisely that is involved at bar.

It is true that it is said in the *Barenblatt* decision that the Committee affected here is possessed of "persuasive authority to investigate Communist activity in this country." (360 U. S. at p. 118.) But it was further said there "This power rests on the right of self-preservation, 'the ultimate value of any society'", and is "justified" upon the "widely accepted view" that the tenets of the Communist Party "include the ultimate overthrow of the Government of the United States by force and violence." (360 U. S. at p. 128.) Whatever its strength or weakness elsewhere, the rule in *Barenblatt* as thus foundationed cannot be invoked at bar.

The base premise in *Barenblatt* will not lie here. The premise of *Barenblatt* directed at advocacy of violence lends no force to the excluding of a person or group from access to the peaceful processes for governmental review and social change. A democratic society relies—by total and fundamental commitment—upon free access to the electoral process for preventing the emergence of forceful, non-democratic change of whatever content. Totally unfettered recourse by all persons to the peaceful channels for electoral change—without discrimination or exclusion of any type—is at once democracy's greatest safeguard, and its most *vital characteristic*.

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity

essential to the security of the Republic, is a fundamental principle of our constitutional system."—*Stromberg* v. *California*, 283 U. S. 359, 369.*

Whatever its name or program**, if a group or political association be willing to tender its program to the ballot and review processes of democratic law, and peacefully seek to persuade the people to utilize those processes to achieve desired changes through those channels, in no manner can open access so to proceed be denied, withheld or burdened. (*Gitlow* v. *New York*, 268 U. S. 652, 673, Justice Brandeis, dissenting)

IV

Contrary thought led the Court of Appeals below to grievous error. That court misread the concept of society's "right of self-preservation" expressed in *Barenblatt* to denote a conceived right in government to invoke its legislative-investigative powers in the circumstance below. In the words of the Court, defendant attempted "to weaken

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* *Accord*:

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."—*DeJonge* v. *Oregon*, 299 U. S. 353, 365.

** "[An] organized group, whether you call it political or not, could hardly be barred from the ballot without jeopardizing the constitutional guarantees of all other political groups and parties."—Testimony of the Attorney General of the United States, Hearings, Sub-Committee on Legislation of the Committee on Un-American Activities, 80th Cong., 2d Sess., 20, quoted by Mr. Justice Black, dissenting, *Barenblatt* v. *United States*, *supra*, 360 U. S. 109, 149.

the Government by impeding and crippling * * * the legislative branch" and "attempt[ed] * * * to develop hostility to the Committee and its investigations." (Pet. App. B, p. 11a) Said the court below: "[These acts] presented a more direct threat to the national security than those [concerning teachers] of which *Barenblatt* was suspected." (Id.)

But this totally misjudges democracy's values. Government within a democracy is not entitled to "protection" against change or criticism expressed within the lawful review processes, however the same be conceived and by whomever instigated or communicated. Such protection does not constitute "national security".* The government has no interest to control or protect itself against the free, uncoerced outcome of any resort to the peaceful review processes of the people; to the contrary, it is upon precisely such free and open determination of policy by the people's will that our nation's "existence depends." (*Ex Parte Yarbrough*, *supra*, 110 U. S. 651, 658.) Any other rule would countenance in the legislature the power to influence its own perpetuation. This is the opening to usurpation.

V

A narrow construction of the Committee's authorizing statute is particularly required here because the damage wrought by the legislative action under the Committee's contruction of its legislative mandate operates directly upon, and undermines, the "corrective processes" of Con-

* The purpose of free speech is to move the people to "unrest" and "opposition", indeed, to "stir [them] to anger" against government; the ultimate purpose of liberty of speech is to peaceably *unseat* governments, and overthrow and replace them, whenever desired by the majority will, nothing less. (See, *Terminiello v. Chicago*, 337 U. S. 1, 4.)

gress, and of the people, relied upon fundamentally in our system for redress of legislative errors. (*Tenney* v. *Brandhove*, 341 U. S. 367, 377; *Newport Bridge Co.* v. *United States*, 105 U. S. 470, 482; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370.) In *Barenblatt* this Court sustained the assertion of power there involved in part upon the premise that " 'remedy lies * * * in the people, upon whom, after all under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power.' " (360 U. S. at p. 133.) But here the processes of the people for correction are themselves affected directly and undermined. If error is tolerated which invites or permits influence by the Committee as here, as a legislative agency, over its own review, and, ultimately, over its own perpetuation, the processes of correction and review are set at naught. Involved may be not merely an invasion of fundamental rights and liberties of the people, but an effort at perpetuation of the power to invade.*

> "Sometimes it is said that man cannot be trusted with the government of himself. Can he, then, be trusted with the government of others? Or have

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* In light of the Committee's long record of assailing persons criticising it or its work, or any governmental policies of which it approves, if the power raised at bar to invoke the investigative processes against citizens solely because of appeals for legislative review by the people lie sustained, hardy indeed must be the citizen hereafter ready to sign a petition for such review, or ready otherwise to invoke the review processes of the people against any act of the Committee, or against any agency or undertaking of government whatever enjoying the Committee's support.

The New York Times, June 22, 1960, already records the summoning of Nobel prize winner, Dr. Linus Pauling, by the Senate Judiciary Committee, an effort through investigative hearings to probe the names of circulators of petitions to world-noted scientists seeking the banning of tests of nuclear weapons.

we found angels in the forms of kings to govern him? Let history answer this question."—Thomas Jefferson, First Inaugural Address.

CONCLUSION

The conviction below should be reversed.

Respectfully submitted,

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